IN THE HIGH COURT OF BOMBAY AT GOA

APPELLATE SIDE

WRIT PETITION NO. 184 OF 2006

NEETA GURUDAS NATEKAR)
Residing at 136D, Ansabhat, Mapusa)
Bardez-Goa.) .. PETITIONER

VERSUS

1. VAISHALI FALARI)
residing at Dattawadi, Mapusa)
Bardez – Goa.)

2. RUPA ANANT MISHAL,)
residing at Ganeshpuri, Mapusa Housing)
Board, Mapusa, Bardez – Goa)

3. Director of Municipal Administration)
Urban Development, Department of)
Urban Development, Collectorate Bldg.,)
4th floor, Panaji - Goa) .. RESPONDENTS

Mr. S.G. Dessai, Senior Advocate with Mr. Shivan Desai, Advocate for the petitioner.
Mr. V. P. Thali, and Ms. G. Pednekar, Advocates for respondent 1.

CORAM:-SMT. RANJANA DESAI, J.

DATE ON WHICH THE
JUDGMENT RESERVED:-**7th JULY, 2006**

DATE ON WHICH THE JUDGMENT
IS PRONOUNCED:- **18th JULY, 2006**

JUDGMENT:

In this petition filed under Article 227 of the Constitution of India, the petitioner has challenged order dated 13-4-2006 passed by the second Additional District Judge, North Goa Panaji in Election Petition No. 1 of 2005.

2. A few facts leading to the filing of this petition may be shortly stated.

Elections for Mapusa Municipal Council for the year 2005-2010 were declared by Goa State Election Commission. The petitioner filed her nomination papers from Ward No. 10 which was reserved for women. The petitioner's nomination was accepted. She appointed her husband Gurudas Natekar as her election agent. The elections were held on 23/10/05.

The election results were announced on 24/10/05. The petitioner lost the said election by a slim margin of 9 votes to respondent 1 Vaishali Falari. Vaishali Falari was declared elected. On account of the slim margin the petitioner's election agent made an application before the Returning Officer for recounting and it was granted. Recounting was done and after recounting

the margin between the petitioner and respondent 1 was reduced to one vote. The petitioner secured 645 votes and Vaishali Falari secured 646 votes. The petitioner again asked for a recounting but the prayer was rejected.

On 25/10/05, the petitioner's election agent made an application for certified copies of certain documents. According to the petitioner the Returning Officer gave certified copies of Form-14 which was the result sheet after recounting and Form-15 which was the return of the election after recounting.

The petitioner's case is that on perusal of the said Forms it was clear that there were some major discrepancies in the total number of votes for polling booth Nos. 16 Part and 17 Part. The petitioner, therefore, filed Election Petition No. 1/2005 before the Municipal Election Tribunal, Panaji-Goa, for a declaration that election of respondent 1 Vaishali Falari in pursuance to elections held on 23/10/2005 from Ward No. 10 of the Mapusa Municipal Council be declared null and void and for a declaration that the petitioner is the duly elected candidate. The petitioner also prayed for an order of recounting of the counted ballot papers by the Returning Officer in respect of Ward No. 10 at polling station Nos. 16 Part and 17 Part.

3. In the said petition the petitioner made an application for production of documents under Section 30 of the Code of Civil Procedure ("C.P.C." for short) read with Section 151 of the C.P.C. In the application the

petitioner stated that the said documents are described in the list of documents annexed to the plaint. They are relied upon documents. They are in possession of Shri Dashrath Redkar, the Returning Officer, who is the witness of the petitioner and who was summoned by the court. The petitioner prayed that summons be issued to Shri Dashrath Redkar for production of the said documents. The documents of which production was sought are as under:

(1) Marked copies of the List of Voters of Ward No. 10 in part 16 & 17.

(2) Application for recount dated 24/10/2005 filed by the election agent of the petitioner.

(3) Ballot papers in favour of the Petitioner which were rejected by the said Returning Officer.

(4) Certified electoral roll of Ward No. 10.

3. Respondent 1 opposed the said application by filing her reply.

4. By the impugned order the learned Judge rejected the said application. The learned Judge was of the view that the petitioner wants a fishing enquiry to be conducted which is violative of sanctity and secrecy of election process. In the opinion of the learned Judge though such inspection can be ordered, no case is made out for that. The said order is challenged in this petition.

5. I have heard Mr. Dessai, learned counsel appearing for the petitioner. Mr. Desai submitted that the learned Judge erred in dismissing the petitioner's application. Mr. Dessai pointed out that the Election Petition was filed on 30/10/05. In that petition Shri Redkar, the Returning Officer is impleaded as respondent 5. To this petition, the petitioner has annexed a list of documents on which she proposes to rely. At Serial No. 13 of the said list ballot papers and/or records of elections are mentioned. It is stated that the said papers are in possession of respondent 5, Shri Dashrath Redkar, the Returning Officer. Mr. Dessai pointed out that in the list of witnesses submitted by the petitioner on 17/1/05, at Serial No. 7 the name of Returning Officer Shri Redkar is mentioned as a witness, whom the petitioner wishes to produce as a witness. He pointed out that on 28/3/06 the petitioner made an application for issuance of summons to the said Dashrath Redkar. It was stated in the said application that the petitioner seeks to call the said witness to give evidence in respect of irregularities committed in the conduct of elections. It was further stated that the said witness is essential in view of the allegations made in the petition. The respondents gave no objection to summoning the witness and the witness was in fact summoned.

6. Mr. Dessai further pointed out that in the application dated 7/4/06 preferred for production of documents under Section 30 read with Section 151 of the C.P.C., the petitioner clarified that the petitioner has relied upon the documents which are described in the list of documents

which is annexed to the election petition. It was stated that the said documents are in possession of respondent 5, the Returning Officer. However, the said application was wrongly rejected. He submitted that, above facts make it clear that right from the beginning it is the case of the petitioner that the said ballot papers and/or records of elections of Ward No. 10 are of vital importance to the petitioner and they are in possession of respondent 5. Mr. Desai contended that in view of the above facts respondent 1 cannot be heard to say that summoning respondent 5 for production of said documents is an afterthought.

7. Mr. Dessai drew my attention to the prayers in the election petition. One of the prayers is for an order of recounting of the counted ballot papers by the Returning Officer in respect of Ward No. 10 at polling station Nos. 16 Part and 17 Part. Mr. Dessai contended that, therefore, there was no question of the petitioner trying to conduct a fishing enquiry. The importance of the said documents has been put by her in the forefront and, therefore, the learned Judge was not justified in rejecting the petitioner's application.

8. Mr. Dessai drew my attention to Goa Municipalities Act, 1968 ("the said Act" for short). He placed reliance on Section 22(7) of the said Act which states that for the trial of election petitions the Judge shall have all the powers of a civil court. So far as it is relevant Section 22 reads as under:

"22. DISPUTES IN RESPECT OF ELECTION OF COUNCILLORS:

(1). No election of a Councillor may be called in question, except by a petition presented to the District Court by a candidate at the election or by any person entitled to vote at the election, within ten days after the publication of the names of the Councillors in the Official Gazette under section 20 or section 21, as the case may be.

(2) …….

(3) …….

(4) …….

(5) …….

(6) …….

(7) For the trial of such petition, the Judge shall have all the powers of a civil court including powers in respect of the following matters, namely:-

(a) discovery and inspection;

(b) enforcing the attendance of witnesses, and requiring the deposit of their expenses;

© compelling the production of documents;

(d) examining witnesses on oath;

(e) granting adjournments;

(f) reception of evidence on affidavit; and

(g) issuing commissions for the examination of witnesses.

And the Judge may summon and examine suo motu any person whose evidence appears to him to be material. The Judge shall be deemed to be a Civil Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898."

9. Mr. Desai contended that, in view of the above provisions, the learned Judge had all the powers to enforce attendance of a witness and compel production of documents. Mr. Dessai contended that, the provisions of the C.P.C. which relate to production of documents would also be applicable to the election petitions. Mr. Dessai relied on **Ramlal Nandlal Dhoot & Co. & Anr. Vs. B. R. Shroti & Ors., A.I.R. 1980 BOMBAY 387** where after considering the relevant provisions of C.P.C. this Court has observed that the court should not exclude evidence which is helpful in deciding controversy. According to Mr. Dessai, the ratio of this judgment is attracted to the present case.

10. Mr. Dessai pointed out that under Section 30 of the C.P.C. the court can at any time either of its own motion or on the application of any party, inter alia make such orders as may be necessary or reasonable relating to the admission, inspection and production of documents and the court can issue summonses to persons whose attendance is required either to give evidence or to produce documents. According to Mr. Dessai, the learned Judge ought to have exercised his powers under the C.P.C. and granted the petitioner's application in the interest of justice.

11. Mr. Dessai pointed out that in fact in the election petition in paragraphs 12 and 13 the petitioner has given the illegalities and irregularities with regard to verification of election rolls. A specific grievance is made that one Prem Kumar Pujari, registered voter in Ward No. 10 had died on19/5/03, however, his name is reflected in the election roll and on behalf of Prem Kumar Pujari bogus voting was done and this is clear from the list of voters maintained by respondent 5. It is further stated that there was also bogus voting done by personation with regard to two voters namely Laxman Naik and Subhash Kolbal. It is stated that the said voters were out of station on the day of polling and could not have voted. It is further stated that the paper material used for casting of the votes was extremely thin and fine and, therefore, the voters were confused and they did not know the place and side of the paper where the seal was to be put. It is stated that a minimum of six votes in favour of the petitioner were illegally rejected on the ground that the seal was purportedly at the back of the paper. The said rejection is illegal because in fact the seal was on the symbol of the petitioner although it was at the back. Mr. Dessai pointed out that thus all the necessary details were given in the election petition itself. The factual foundation was laid by the petitioner. The petitioner's case does not rest on mere allegations. It cannot, therefore, be argued that the petition is bereft of any particulars.

12. Mr. Dessai contended that the judgments on which the petitioner has placed reliance have no application to the facts of this case inasmuch as they pertain to the Representation of People Act, 1950 which makes certain provisions for the elections to the House of the People and the Legislature of States. He pointed out that Section 87 thereof states that every election petition shall be tried by the High Court as nearly as may be in accordance with the procedure applicable under the C.P.C. to the trial of the suits. But the proviso to this Section says that the High Court shall have the discretion to refuse for reasons to be recorded in writing to examine any witness or witnesses if it is of the opinion that evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous ground or with a view to delay the proceedings. Mr. Dessai contended that Section 22(7) of the said Act, however, specifically confers powers of civil court on a Judge trying election petitions as regards discovery and inspection, production of documents, enforcing of attendance of witnesses etc. Mr. Dessai contended that the judgments of the Supreme Court which deal with elections to the House of People or to the Legislatures of States are not applicable to the election petitions under the said Act. The same principles would not govern the election petitions under the said Act. Mr. Dessai submitted that it was incumbent upon the learned Judge to ensure that all documents which will help her to resolve the controversy effectively are brought before her. The

learned Judge has acted illegally in exercise of her jurisdiction and, therefore, the impugned order be set aside.

13. Mr. Thali, the learned counsel for respondent 1 on the other hand contended that in a petition filed under Article 227 of the Constitution of India, the jurisdiction of this court is to ensure that the inferior court or Tribunal functions within the limits of its authority. In support of this submission he relied on judgment of the Supreme Court in **Mohd. Yunus v. Mohd. Mustaqim & Ors., (1983) 4 SCC 566,** where the Supreme Court has observed that in its jurisdiction under Article 227, the High Court does not act as an Appellate Court or Tribunal. It will not review or reweigh the evidence upon which the determination of the inferior court or Tribunal purports to be based or to correct errors of law in the decision. Mr. Thali contended that in this case it cannot be said that the Tribunal has exceeded its jurisdiction and, therefore, this court should not interfere with the impugned order.

14. Several judgments have been cited by Mr. Thali. However, it is not necessary to refer to all the judgments because they lay down the same principles. The learned counsel contended that it is necessary for a person who seeks production of a witness for the purpose of producing documents in the court to make averments in the application containing material particulars of the allegations which he wants to prove. In this connection he referred to **Ram Sewak Yadav v. Hussain Kamil Kidwai**

and Ors., A.I.R. 1964 S C 1249 and **Basanagouda v. Dr. S.B. Amarkhed & Ors., (1992) 2 SCC 610.** Mr. Thali then contended that where a party wants the court to assist it in producing witness in the court it is obligatory on it to file the gist of evidence. He contended that it was necessary for the petitioner to file a gist of evidence of respondent 5. In this connection he relied on **Mange Ram v. Brij Mohan & Ors., (1983) 4 SCC 36** and **Quamarul Islam v. S. K. Kanta & Ors, 1994 Supp (3) SCC 5**.

15. Mr. Thali then submitted that secrecy of ballot paper is of utmost importance. In this connection he referred to Section 30 of the said Act. He also referred to Rule 51 of the Goa Municipalities (Election) Rules, 1969 ("the said Rules" for short). He also referred to Rule 61 of the said Rules. The learned counsel then drew my attention to Section 128 of the Representation of People Act, 1951. He also referred to Section 94 of the same Act which states that no witness or other person shall be required to state for whom he has voted at an election. He submitted that, therefore, order directing production of ballot papers cannot be lightly passed and the court has to be circumspect while passing such orders. In this connection he referred to **Bhabhi v. Sheo Govind & Ors., (1976) 1 SCC 687** He also relied on **Dr. Jagjit Singh v. Giani Kartar Singh & Ors., A.I.R. 1966 S C 778.**

16. Mr. Thali then submitted that merely because the margin of votes by which the respondent has won is very thin the court should not order production of ballot papers. Thin margin can never be the consideration for ordering recount and this will apply to order of production of documents like ballot papers. In this connection he relied on **R. Narayanan v. S. Semmalai & Ors., (1980) 2 SCC 537**, **Hari Ramv. Hira Singh & Ors., (1984) 2 SCC 36** and **M. Chinnasamy v. K.C. Palanisamy & Ors., (2004) 6 SCC 341**. Mr. Thali contended that though in all the judgments cited by him the Supreme Court was considering the provisions of the Representation of People Act, the principles laid down by the Supreme Court would be applicable even to Municipal elections. He submitted that when the counting was going on the election agent of the petitioner was present. At that stage he raised no objection. He submitted that the election petition is being heard. In the petition one of the prayers of the petitioner is for an order of recounting of the counted ballot papers by respondent 5. Therefore, if the petition succeeds the petitioner can certainly get the recounting of the counted ballot papers done. The ultimate relief ought not to be granted to the petitioner at this stage. The evidence of nine witnesses is already adduced. At this stage it would be inappropriate to order production of ballot papers. He, therefore, submitted that the petition should be dismissed.

17. At the outset, I must deal with Mr. Dessai's argument that the judgments cited by Mr. Thali, have no application to the facts of the instant case because in those cases the Supreme Court was considering the provisions of the Representation of People Act. It is true that the Representation of People Act concerns itself with elections to the House of People and the Legislatures of the States and in this case, we are concerned with Municipal election, for which the provisions of the said Act and the said Rules will have to be looked into. However, election whether Parliamentary or Municipal will, in my opinion, be governed by the same principles. Municipal elections are by no means unimportant. In a democratic set up all elections are important and they must be conducted with strict adherence to the settled principles. Basic concepts like secrecy of ballot papers would remain the same. Similarly the requirement of adequate pleadings in an election petition would be present in all cases. In my opinion, therefore, this court can certainly consider the principles laid down in the judgments cited by Mr. Thali while deciding this petition.

18. Before I deal with the rival contentions it is necessary to see what the Supreme Court has said about production of documents. In **Basanagouda's case (supra)**, the Supreme Court was considering the question of production of documents sought by election petitioner. The Supreme Court observed that the court's power to order production of documents is coupled with discretion to examine the expediency, justness

and the relevancy of the documents to the matter in question. These are relevant considerations which the court shall have to advert to and weigh before deciding to summoning the documents in possession of the party to the election petition. The Supreme Court further observed that allegations must be pleaded clearly and secrecy of the ballot boxes cannot be tinkered unless an iron-cast case is made out in the election petition.

19. In **Ram Sewak's case (supra)**, while dealing with the same question the Supreme Court observed that an order for inspection of ballot papers may not be granted as a matter of course; having regard to the insistence upon the secrecy of the ballot papers, the Court would be justified in granting an order of inspection provided the petition for setting aside an election contains an adequate statement of the material facts and the Tribunal is prima facie satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is a must. It was further observed that an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas.

20. After referring to several judgments, in **Bhabhi's case (supra)** the Supreme Court laid down the conditions which are imperative before a court can grant inspection of ballot papers. I may quote the relevant paragraph;

"(a) On a close and careful consideration of the various authorities of the Supreme Court from time to time it is manifest that the following conditions are imperative before a court can grant inspection, or for that matter sample inspection, of the ballot papers:

(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;

(2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;

(3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;

(4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;

(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and

(6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials."

I will have to approach this case bearing the above principles in mind.

21. In this case in the petition, the petitioner has stated that there was voting by personation. It is suggested that bogus voting was done by some one posing to be Prem Kumar Pujari though Prem Kumar Pujari had died on 9/5/03. There was also bogus voting with regard to Laxman Naik and Subhash Kolbal. It is also stated that six votes which were cast in favour of the petitioner were illegally rejected on the ground that seal was put at the back of the paper. Now if these illegalities or irregularities were noticed it is not understood why the election agent or polling agent was not immediately contacted. Though there are some averments in the petition there is no contemporaneous evidence. They are unsubstantiated bald statements which will have to be supported by adducing evidence.

22. It is not necessary to repeat that the secrecy of the ballot is sacrosanct. Section 94 of the Representation of People Act states that no witness or other person shall be required to state for whom he has voted in an election. Section 128 of the same Act speaks of maintenance of secrecy of voting. It is similar to Section 30 of the said Act. It reads thus;

"30. MAINTENANCE OF SECRECY OF VOTING:-

(1) Every officer, clerk, agent or other person who performs any duty in connection with the recording or counting of votes at an election shall maintain and aid in maintaining the secrecy of the voting and shall not (except for some purpose authorized by or under any)law communicate to any person any information calculated to violate such secrecy.

(2) Any person who contravenes any provisions of sub-section (1) shall, on conviction, be punished with imprisonment for a term which may extend to three months, or with fine, or with both."

23. Rule 51 of the said Rules states that the Returning Officer before he commences the counting must read out the provisions of Section 30 to such persons as may be present. That means the Returning Officer has to intimate to such persons the importance of maintenance of secrecy of voting. All these provisions make it clear that secrecy of ballot papers is to be maintained at any cost. I have already noted the observation of the Supreme Court in **Bhabhi's case (supra),** to the effect that secrecy of ballot papers cannot be violated on vague grievances; that the court must be prima facie satisfied about the truth of allegations for recount and that the court must be satisfied that prayer of inspection is necessary to do full justice between the parties. The court must not permit roving inquiry. I

am unable to come to a conclusion that the present case is iron-cast case and it fulfills all the above conditions.

24. In this case there is a thin margin of votes between the petitioner and respondent 1. But it is also well settled that thin margin will not persuade a court to order recount or inspection of ballot papers. This has been said by the Supreme Court in **Naraynan's case (supra).** Therefore, that consideration cannot weigh with the court.

25. It is now necessary to have a look at the factual matrix. The issues were settled by the learned Judge on 27/12/05. The petition was fixed for hearing on 3/1/06. On 9/1/06 affidavit-in-chief of the petitioner was submitted in advance and on10/1/06 cross-examination of the petitioner was partly recorded. On 12/1/06 affidavit-in-chief of PW 2 was submitted in advance. On 13/1/06 cross-examination of PW 13 was completed and cross-examination of PW 2 was partly recorded. On 16/1/06 affidavit-in-chief of PW 3 was submitted in advance. On 17/1/06 a list of witnesses was presented by the petitioner proposing to call10 witnesses to give evidence. No witness from the said list was proposed to be called to produce any document. The petitioner did not present any separate list to call any witness to produce any document. The petitioner did not file any application for obtaining any summons, for the attendance of any witness, either to give evidence or to produce any document in terms of Order XVI Rule 1(2). The petitioner also did

not file any application in terms of Order XVI Rule 1(4) of the Code for obtaining any summons. On 17/1/06 cross-examination of PW 3 was completed. On 31/1/06 evidence of PW 4 and PW 5 was completed. The matter was posted for further evidence. On 10/2/06, when the petitioner asked for adjournment it was granted.

26. On 28/2/06 the petitioner filed application under Order XVI Rule 1 of the Code for summoning witnesses at Serial Nos. 8, 9 & 10 of her list of witnesses. On 10/3/06 that application was granted and evidence of PW 6 was completed. On 28/3/06 evidence of PW 7, 8 & 9 was completed. The petitioner then filed an application for issuance of summons to Shri Dashrath Redkar , (witness at Serial No.7 of her list of witnesses) for the purpose of giving evidence. In this application the petitioner did not say that she proposes to call the said witness for producing any documents. She only stated that she proposes to call the said witness to give evidence in respect of irregularities committed in the conduct of election. Respondent 1 gave her no objection for issuance of summons.

27. On 7/4/06 the petitioner filed an application under Order XVI for issuance of summons to Shri Dashrath Redkar for production of documents. In this application the petitioner did not state why in her application dated 28/3/06 for obtaining summons for attendance of the said witness for the purpose of giving evidence she did not state that she

wanted a summons to be issued to Shri Redkar for production of documents.

28. The petitioner then filed the instant application under Section 30 of the Code seeking inspection of ballot papers. The reason why it is necessary to consider the above facts is that almost in the midst of the hearing of the petition, the petitioner is seeking production of certain documents, some of which by their very nature cannot be ordinarily ordered to be produced. After evidence of 9th witness is completed allowing such an application would thwart trial of the petition. Looking at the prayers of the petition it can be said that it would amount to granting the ultimate prayer at this stage. Besides if the petitioner can persuade the court to grant her the same prayer upon conclusion of the hearing, there is no reason why at this stage when the trial is drawing towards conclusion, an order of production of documents should be passed. It is not expedient to pass such order at this point of time. Such approach, in my opinion, is proper because no prejudice is likely to be caused to the petitioner, if at this stage her prayer is not granted.

29. In this connection it is necessary to refer to the judgments of the Supreme Court in **P.K.K. SHAMSUDEEN v. K.A.M. MAPILLAI MOHINDEEN & ORS., (1989) 1 SCC 525.** The Supreme Court was concerned with the election to the post of the President of a village panchayat in Tamil Nadu. Respondent 1 was declared elected having

secured 649 votes. The petitioner and respondent 2 who were other contestants were declared to have secured only 556 votes and 8 votes respectively. Fifty five votes were declared to be invalid votes. After the election results were declared, the petitioner filed election petition under Section 178 of the Tamil Nadu Panchayats Act before the Election Tribunal. He alleged that the Returning Officer had wrongly treated some valid votes cast in his favour as invalid votes and a certain number of invalid votes as votes validly cast in favour of respondent 1 and that Returning Officer had failed to permit him and his agents to have scrutiny of the ballot papers at the time of counting. He, therefore, sought reliefs (a) of setting aside the election of respondent 1, (b) ordering of recount of votes and (c) a declaration that he had been duly elected.

30. Respondent 1 opposed the election petition. The Tribunal, after recording the evidence of all the candidates and the Assistant Returning Officer came to the conclusion that the petitioner is entitled to ask for recount of votes. It ordered recounting and called for the ballot papers. In the recount of votes it was found that there was no difference in the number of votes secured by the petitioner i.e. 556 votes but insofar as respondent 1 is concerned, he had secured only 528 votes as against 649 votes he was originally held to have secured. Excess of 121 votes were found to be invalid votes and, therefore, the total number of invalid votes came to 126 as against 55 votes originally held to be invalid votes.

There was no difference in the number of 8 votes secured by the third contestant. All the three candidates accepted the correctness of the recounting of votes. The petitioner pressed for a declaration that he had been declared elected on the basis of the result of the recount. Respondent 1 prayed that fresh election be held. The Tribunal declined to order re-election and declared the petitioner to be elected because according to the Tribunal the recount clearly proved that the petitioner had secured 28 votes more than respondent 1.

31. Against the order of the Tribunal respondent 1 filed Civil Revision Application in the High Court. The High Court allowed the revision and held that the Tribunal erred in ordering a recount when the petitioner had not made out a prima facie case. The High Court pointed out that secrecy of the ballot is sacrosanct and as such it should not be violated by any Tribunal unless a prima facie case of a compulsive nature had been made out. The petitioner challenged this order in the Supreme Court. The Supreme Court took a resume of its several judgments where secrecy of ballot is emphasized. The Supreme Court observed as under:

> **"Thus the settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derived from hindsight and by the result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by**

an election petitioner on the threshold before an order for recount of votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or court should not order the recount of votes."

32. The Supreme Court further observed that the petitioner had neither made such averments in the petition nor adduced evidence of such a compulsive nature as could have made the Tribunal reach a prima facie satisfaction that there was adequate justification for the secrecy of the ballot being breached. The Supreme Court observed that factor such as respondent had accepted correctness of the recount and that he had conceded his defeat and wanted a re-election to be held cannot constitute justifying material in law for initial order of recount of votes made by the Tribunal. It was argued before the Supreme Court that it would be

travesty of justice and opposed to all democratic canons to allow respondent 1 to continue to hold the post of President of the Panchayat when the recount discloses that he had secured 28 votes less than the petitioner. The Supreme Court repelled this contention by observing that an order of recount of votes must stand or fall on the nature of the averments made and the evidence adduced before the order of recount is made and not from the results emanating from the recount of votes. It is pertinent to note that though after recount the petitioner was declared to be elected, the Supreme Court held that the order of recount was bad because there were no sufficient averments in the petition and no sufficient evidence was adduced by the petitioner.

33. Reference may also to be made to **Satyanarain Dudhani v. Uday Kumar Singh & Ors., 1993 Supp.(2) SCC 82**, where the Supreme Court was concerned with the election to the Bihar Legislative Assembly. The Returning Officer had refused to order recounting. The Supreme Court observed that the secrecy of the ballot papers cannot be permitted to be tinkered lightly. An order of recount cannot be granted as a matter of course. It was further observed that only when the High Court is satisfied on the basis of material facts pleaded in the petition and supported by the contemporaneous evidence that the recount can be ordered. The Supreme Court further observed that when there was no contemporaneous evidence to show any irregularity or illegality in the

counting, ordinarily it would not be proper to order recount on the basis of bare allegations in the election petition.

34. In my opinion, in the context of the present case the observations of the Supreme Court in the above cases are very important. Unless there are material facts pleaded and supported by contemporaneous evidence, inspection of ballot papers cannot be granted. I have already noted that there are some averments in the petition but they are bald unsubstantiated assertions. There is no contemporaneous evidence to substantiate them. In **Shamsudeen's case (supra)** where the Supreme Court has emphasized the importance of evidence, it was dealing with a case where the petition was disposed of. In this case 9 witnesses have already been examined. It is, therefore, expedient not to interfere with the trial of the petition but ask the petitioner to complete leading of evidence. If she substantiates her case by leading evidence she will get the same relief. This is not a case where at this stage on the basis of mere allegations not substantiated by contemporaneous evidence secrecy of ballot can be breached .

35. In view of the above, the petition will have to be dismissed and is dismissed as such.

36. I, however, make it clear that nothing said by me in this judgment should be treated as my final opinion on the merits of the case of the parties. The learned Judge should deal with it independently.

(SMT. RANJANA DESAI, J.)